

FILED

JAN 11 2005

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DONALD J. BEARDSLEE,

Petitioner-Appellant

v.

JEANNE S. WOODFORD,

Director of the Department of  
Corrections,

JILL L. BROWN, Warden

And Does 1-50

Respondents-Appellees

CA #

DC # C 04-5381 JF

EXECUTION

IMMINENT: 1/19/05

EMERGENCY MOTION FOR STAY OF EXECUTION

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HONORABLE JEREMY FOGEL

United States District Judge

Steven S. Lubliner (SBN 164143)

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Attorney for Plaintiff-Appellant

DONALD J. BEARDSLEE

Plaintiff/appellant Donald J. Beardslee is scheduled to be executed on January 19, 1005. His underlying complaint, brought pursuant to 42 U.S.C. Section 1983, alleges that California's lethal injection procedure violates the Eighth Amendment and the First Amendment to the United States Constitution. This appeal concerns the denial of a preliminary injunction to pursue these claims on the merits. Appellant seeks a stay of execution so that this appeal can be properly litigated while he is still alive.

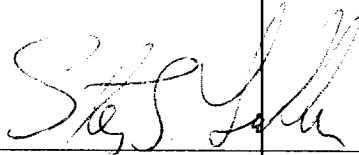
The standard for granting a stay pending appeal is the same as that for granting a preliminary injunction. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9<sup>th</sup> Cir.), *rev'd in part on other grounds*, 463 U.S. 1328 (1983). In the opening brief, appellant showed that he was entitled to a preliminary injunction and that the district court abused its discretion and committed legal error in finding otherwise. Most significantly, the district court disposed of appellant's demonstrated concerns about the administration and delivery of drugs under the *California* protocol *on the merits* by citing a *Virginia* district court case, *Reid v. Johnson*, 333 F. Supp. 2d 543 (D.Va.2004), a case that specifically stated that it would not consider evidence of problems with administration and delivery.

The balance of equities favor appellant, as respondents conceded by their silence in their opposition papers in the district court.

Therefore, a stay of execution should issue to allow this appeal to be litigated in an orderly manner.

DATED: January 10, 2004

Respectfully submitted:

A handwritten signature in cursive script, appearing to read 'S. S. Lubliner', written over a horizontal line.

Steven S. Lubliner  
Attorney for Donald Beardslee

## **PROOF OF SERVICE**

I, Steven S. Lubliner, certify and declare under penalty of perjury that I: am a citizen of the United States; am over the age of 18 years; am in practice at the address indicated; am a member of the State Bar of California and the Bar of this Court; am not a party to or interested in the cause entitled upon the document to which this Proof of Service is affixed; and that I served a true and correct copy of the following document(s) in the manner indicated below:

### **APPELLANT'S OPENING BRIEF**

### **APPELLANT'S EXCERPTS OF RECORD (3 volumes)**

### **REQUEST FOR ARGUMENT AND DECISION BY MERITS PANEL**

### **EMERGENCY MOTION FOR STAY OF EXECUTION**

- ☐ by today depositing, at Petaluma, California, the said document(s) in the United States mail in a sealed envelope, with first-class postage thereon fully prepaid (and/or):
- ☐ via facsimile machine, pursuant to California Rules of Court, rule 2008. The facsimile machine I used complied with Rule 2003, and no error was reported by the machine. The phone number for the sending machine is (707) 789-0515. Pursuant to Rule 2008(e)(4), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration.
- ☒ by today personally delivering the said document(s) to the person(s) indicated below in a manner provided by law, by leaving the said document(s) at the office(s) or usual place(s) of business, during usual business hours, of the said person(s) with a clerk or other person who was apparently in charge thereof and at least 18 years of age, whom I informed of the contents.

Dane R. Gillette  
Senior Assistant Attorney General  
Office of the Attorney General  
455 Golden Gate Avenue, Suite 11000  
San Francisco, CA 94102-3664

Executed in Petaluma, California on January 11, 2005

